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inconvenience discussed by counsel cannot be considered by the court. The fact is that the defendant unlawfully withholds possession of the plaintiff's property, to which it has acquired no title, and for which he has received no compensation. It is competent, however, for the company, if it cannot acquire the land by private agreement, to condemn it; and thus it is hardly probable that public inconvenience will result from a reversal of the judgment complained of. But be that as it may, the plaintiff has not shown himself entitled to recover, and the judgment must be reversed." If a plaintiff in an action of unlawful detainer is entitled to a writ of possession, as was adjudged in that case, for a detached portion of the bed of the railroad, clearly the judgment lien creditor in this case can subject the detached portion of the railroad upon which he has a lien to its payment by a sale thereof.

We are of opinion that the Circuit Court did not err in decreeing a sale of said strip of land, including the improvements thereon. The Baylor judgment, having, as we have seen, been properly docketed, is a prior lien upon all the lands directed to be sold by the decree appealed from, including said railroad strip, and is also a lien upon the strip of land purchased by the said railroad company from J. M. Wheeler, together with its improvements, and the Circuit Court erred in not so holding.

The decree appealed from must be reversed in so far as it is in conflict with the views expressed in this opinion, and affirmed in other respects, and the cause will be remanded to the Circuit Court for further proceedings to be had in accordance with law, and not in conflict with this opinion.

Reversed.

FUNKHOUSER V. SPAHR.*

Supreme Court of Appeals: At Richmond.

January 14, 1904.

1. CONSTITUTIONAL LAW—*Court of Appeals of Virginia*—How many must concur—*Rehearing*. The assent of at least three of the judges of this court is required by section 88 of the Constitution (1902) only when it is necessary to determine that a law is or is not repugnant to the constitution of this state or of the United States. In other cases, not

* Reported by M. P. Burks, State Reporter.

involving the constitutionality of a law, section 3485 of the Code applies which requires this court to affirm "where the voices on both sides are equal." No rehearing is required.

2. WRITTEN INSTRUMENTS—*Construction*. In construing constitutions, statutes and other written instruments, effect should be given to every word used, unless to do so would lead to a conclusion absurd in itself, or necessarily repugnant to the plain meaning of the instrument.
3. CONSTITUTIONAL LAW—*Construction—Views of members of convention*. The meaning of constitutional provisions and legislative enactments is to be ascertained from the language used and not from the views of individual members of the body which proclaimed or enacted them, though the history of the times may be consulted in order to ascertain the reason as well as the meaning of the provision under consideration.

Petition to rehear a judgment of affirmance entered by an equally divided court at September term, 1903. *Refused.*

The opinion states the case.

Elder & Elder, for the petitioner.

KEITH, P., delivered the opinion of the court.

Funkhouser, who was plaintiff in error in the case of *Funkhouser v. Spahr*, asks a rehearing of the judgment rendered against him at the September term of this court in pursuance of section 3845 of the Code of 1887, which is as follows:

"The appellate court shall affirm the judgment, decree, or order, if there be no error therein, and reverse the same, in whole or in part, if erroneous, and enter such judgment, decree or order, as the court whose error is sought to be corrected ought to have entered, affirming in those cases where the voices on both sides are equal: provided, however, that in order to declare, in any case, any law null and void by reason of its repugnance to the Constitution of the United States or the Constitution of this State, it shall be necessary that a majority of the judges elected to the Supreme Court of Appeals shall concur."

The contention of the petitioner is that the section above quoted is repugnant to the last sentence of section 88, art. VI, of the Constitution, which is as follows:

"Whenever the requisite majority of the judges sitting are unable to agree upon a decision, the case shall be reheard by a full bench, and any vacancy caused by any one or more of the judges being

unable, unwilling, or disqualified to sit, shall be temporarily filled in a manner to be prescribed by law."

It will not do to segregate this sentence from its context. It is found in section 88 of article VI of the Constitution, which deals with the organization and jurisdiction of this court. After stating with precision the subjects over which this jurisdiction shall extend, it proceeds to set forth the manner in which that jurisdiction shall in certain cases be exercised, and declares that: "The assent of at least three of the judges shall be required for the court to determine that any law is, or is not, repugnant to the Constitution of this state or of the United States; and if in a case involving the constitutionality of any such law, not more than two of the judges sitting agree in opinion on the constitutional question involved, and the case cannot be determined without passing on such question, no decision shall be rendered therein, but the case shall be reheard by a full court; and in no case where the jurisdiction of the court depends solely upon the fact that the constitutionality of a law is involved, shall the court decide the case upon its merits, unless the contention of the appellant upon the constitutional question be sustained. Whenever the requisite majority of the judges sitting are unable to agree upon a decision, the case shall be reheard by a full bench, and any vacancy caused by any one or more of the judges being unable, unwilling or disqualified to sit, shall be temporarily filled in a manner to be prescribed by law."

The Constitution which preceded that now in force provided that "the assent of a majority of the judges elected to the court shall be required in order to declare any law null and void, by reason of its repugnance to the federal Constitution, or to the Constitution of this state." The provision of the former Constitution upon this subject was deemed inadequate by the convention which framed the present Constitution, and it inserted in lieu of it the provision as it now stands, which declares that "the assent of at least three of the judges shall be required for the court to determine that any law is or is not repugnant to the Constitution of this state or of the United States." Where the constitutionality of a law is drawn in question, it is plain, therefore, that the assent of three judges is necessary to decide the case. A less number cannot hold that a law is constitutional or that it is unconstitutional. The assent of three judges is essential to the judgment, is a juris-

dictional necessity, and less than that number is incapable of pronouncing any judgment in such a case. The convention was impressed with the delicacy and importance of the jurisdiction exercised by courts in passing upon the constitutionality of a law. It felt that the provision upon the subject in the former constitution, which only went to the extent of holding that a law could not be declared null and void, as repugnant to the Constitution of the United States or of the state, unless three of the judges of the court concurred in that conclusion, did not fully meet the requirements of the situation, for under the law as it then stood an unconstitutional law might, in a particular case, be binding and operative upon the parties to the litigation because of an equal division among the judges composing the court. It considered that all cases in which the constitutionality of a law is involved are of first importance; that no statute which transcends the fundamental law should be enforced against any citizen; and therefore it required the concurrence of three judges for the disposition of the question, and prohibited any judgment for or against the validity of the law by an equally divided court. The evil which the convention sought to remedy was plain and obvious; the remedy which it applied is adequate and complete.

In the concluding sentence of the section under consideration, separated from what has been quoted, it is true, by a period but wholly germane to and *in pari materia* with what has gone before, and with the manifest purpose of providing the means for carrying out the object so clearly expressed in the preceding portion of this section, the following language is used: "Whenever the requisite majority of the judges sitting are unable to agree upon a decision, the case shall be reheard by a full bench, and any vacancy caused by any one or more of the judges being unable, unwilling, or disqualified to sit, shall be temporarily filled in a manner to be prescribed by law." Now, if the purpose had been to prohibit the decision of any case by a divided court, we presume that the Constitution would have said so. The end could have been reached by simply declaring that in every case a majority of the judges sitting must agree upon a decision. If it had been intended that this sentence should reach a class of cases not embraced in that which precedes it, the convention might, with great propriety, have made it an independent paragraph; but if that be not so, the language

employed seems to be conclusive against the construction contended for by the petitioner. "Whenever the requisite majority of the judges sitting are unable to agree upon a decision, the case shall be reheard by a full bench." "Whenever" is an adverb of time. It is not the equivalent of "in any case." Its meaning, and the only meaning given to it by lexicographers, is "at whatever time." This sentence is not to be read as though the Constitution had said, "In any case in which the requisite majority of the judges sitting are unable to agree upon a decision, the case shall be reheard by a full bench," but "At whatever time it may happen that the requisite majority of the judges sitting are unable to agree upon a decision, the case shall be reheard by a full bench;" that is to say, the "case" and the "decision" in which the constitutionality of a law shall be called in question. What is meant by "the requisite majority?" Obviously, that "the assent of at least three of the judges shall be required to determine that any law is or is not repugnant to the Constitution of this State or of the United States."

If the sentence now being considered was meant to apply to cases in which a constitutional question does not arise, and to forbid the decision of such cases when the "voices on both sides are equal," in the language of section 3485, then it would have been enough to forbid the decision of any case unless a majority of the judges sitting should concur. The use of the word "requisite" would in such case be superfluous and unnecessary. The Constitution, however, uses the expression "requisite majority," and it is our duty in expounding it to give due effect to every word. We can reject no word as superfluous, unless it may be in an extreme case, in which not to do so would lead to a conclusion absurd in itself or necessarily repugnant to the plain meaning of the Constitution. "Requisite" means "essential, indispensable," and "requisite majority" must of necessity refer to the concurrence of three judges, for that satisfies, and alone satisfies, and gives force and effect to each word employed.

It is well to observe the precise language employed from another point of view. "If in a case involving the constitutionality of any such law, not more than two of the judges sitting agree in opinion on the constitutional question involved, and the case cannot be determined without passing on such question, no decision shall be rendered therein, but the case shall be reheard by a full court;" but

no provision is made for the contingency of one of the judges being unable, unwilling, or disqualified to sit. In cases involving questions of the gravest importance it may well be that one of the judges, for some cause, cannot sit; and in that event, if the remaining four are equally divided, what becomes of the case? It can only be decided by a "full court," and there is no provision for supplying the place of the absent judge, unless recourse be had to the concluding sentence of this section, or a special court of appeals be organized under the succeeding section. Here, then, is a reason—and a sufficient reason—for the addition to section 88 of the sentence under discussion. Again, if that sentence applies to all cases, then it follows either that the "requisite majority" of three judges is necessary in all cases, which would render by far the greater part of the careful provision with respect to cases involving constitutional questions meaningless and nugatory, or, if it be contended that a court of three may hear and a majority of two may decide a case not involving a constitutional question, then the adjective "requisite," which qualifies "majority," and limits its meaning, is not only superfluous, but misleading, while one of the established canons of construction, as we have seen, is that effect shall be given to every word in the instrument to be construed, whether it be a will, a contract, a statute, or a constitution.

Letters from eminent members of the constitutional convention are copied into the petition, from which it would appear that, in their opinion, the convention intended to accomplish the result contended for by the petitioner, and its purpose was to prohibit the decision of any case where the judges were equally divided.

In *United States v. Union Pacific R. R. Co.*, 91 U. S. 72, 23 L. Ed. 224, construing an act of Congress, the court said: "We are not at liberty to recur to the views of individual members in debate, nor to consider the motives which influenced them to vote for or against its passage. The act itself speaks the will of Congress, and this is to be ascertained from the language used. But courts may with propriety, in construing a statute, recur to the history of the times when it was passed, and this is frequently necessary, in order to ascertain the reason as well as the meaning of particular provisions in it."

In *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 318, 17 Sup. Ct. 550, 41 L. Ed 1007, Justice Peckham uses the follow-

ing language: "There is, too, a general acquiescence in the doctrine that debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body. The reason is that it is impossible to determine with certainty what construction was put upon an act by the members of a legislative body that passed it by resorting to the speeches of individual members thereof. Those who did not speak may not have agreed with those who did, and those who spoke might differ from each other; the result being that the only proper way to construe a legislative act is from the language used in the act, and, upon occasion, by a resort to the history of the times when it was passed"—citing a great number of authorities.

The English cases are to the same effect. In *The Queen v. Hertford College*, 3 Queens Bench Div., at page 707, Lord Chief Justice Coleridge says: "We are not concerned with what Parliament intended, but simply with what it has said in the statute. The statute is clear, and the parliamentary history of a statute is wisely inadmissible to explain it, if it is not."

And this court, in *Sherwood v. A. & D. R. R. Co.*, 94 Va. at page 301, 26 S. E. 946, uses the following language: "It is the duty of the court to ascertain the intention of the legislature, and, when ascertained, to give it effect; and in the search for that intent it is its duty to consider the object of the statute and the purpose to be accomplished. It must reach the intent, however, by giving to the words used their ordinary and usual signification, and to every word and every part of the statute, if possible, its due effect and meaning. . . The intent of the legislature, therefore, is always to be sought for by giving a fair construction to the language used, attributing to the words their ordinary and popular meaning, unless it plainly appears that they were used in some other sense."

Our consideration of the case leads us to the conclusion that the convention did not intend to forbid the decision of the case by this court where the voices of both sides are equal, unless there is drawn in question the constitutionality of a law.

The petition to rehear is refused.

BUCHANAN, J., unites in the decision.

Refused.

EDITORIAL NOTE.—The authorities cited in the opinion seem conclusive of the question as to the inadmissibility of the views of individual members of

a legislative body of any kind to guide the judgment of a court called upon to construe an ordinance or act emanating from such a body. There are some respectable authorities, however, to the effect that *the debates in convention* upon the adoption of a state constitution may be consulted in determining the meaning of constitutional provisions, where, from any cause, *the meaning of the words is left in doubt*. *City of Springfield v. Edwards*, 84 Ill. 626; *Minn. &c. R. Co. v. Sibley*, 2 Minn. 13; *Crowell v. Lambert*, 9 Minn. 283; *State v. Doran*, 5 Nev. 329; *Cass v. Dillon*, 2 Ohio St. 607; *Bank v. Hines*, 3 Id. 1; *State v. Closkey*, 37 Tenn. 402. In *Alexander v. People*, 7 Col. 155, however, it was held that as the constitution derives its force from the people who ratify it, the language used therein must be construed according to the sense most obvious to the common understanding, and the proceedings of the constitutional convention are of no assistance in interpretation. The present Constitution of Virginia was never ratified by the people, but the probability of the rejection of such an instrument upon the ground that the people did not understand it is rather fanciful than substantial, and therefore the conclusion is the same. Other authorities supporting the ruling in the principal case are *Smith v. Thursby*, 28 Md. 244, and *State v. New Orleans*, 35 La. Am. 532. In *Taylor v. Commonwealth*, ante, p. 381, the court adjudged the Virginia Constitution of 1902, promulgated by the convention which framed it, to be the only rightful, valid and existing constitution in this state, and that to it the citizens of the state owe obedience and loyal allegiance. The court expressly declined to pass upon the power of the convention to promulgate or proclaim the Constitution, because, first, of the absence of library facilities to investigate the question, and second, because that instrument, having been acknowledged and accepted by the people of the state, had already become the *de facto* fundamental law. We must express our regret, in passing, that the court did not see its way clear to render an opinion upon the subject, for, as one of novelty and interest—and, we may add, one by no means free from difficulty—its views would have aroused national attention and the case would have become a leading one in our reports.

Upon the merits of the question in the principal case, we append the following extract from the letter of one of the eminent members of the convention, referred to in the opinion. The letter was addressed to counsel for plaintiff in error.

"You ask:

"Does section 88 of article 6 of the Constitution intend to provide, and does it in fact provide, that every cause which comes to the Court of Appeals for adjudication shall be decided by a majority of the court sitting, and that in case the court is evenly divided, there shall be a re-argument before a full court?"

"In reply to this inquiry, I regret to say that I have nothing but my unassisted memory to go upon, because the clause in question—the last sentence of the 88th section—does not seem to have provoked discussion either in the Committee of the Whole or in the Convention. My recollection is that the clause in question was introduced by me in the Judiciary Com-

mittee, of which I was a member, and that it was there debated to some extent. I have not the slightest doubt in my mind that it was my intention in introducing that clause, the understanding of the Committee in reporting it, and the Convention in adopting it, that its effect should be to prevent the affirmance of a decision appealed from, by an equally divided court.

"I myself had long been of the opinion that such affirmances were an evil which should be corrected. In my opinion they practically amounted to a mistrial and were on a par with 'hung juries.' My purpose in introducing and voting for the clause in question was to insure a decision of every appeal by *at least a majority* of the judges sitting, and I well remember explaining my views on this point when the matter was before the Judiciary Committee. I am under the impression that I also made some remarks on this subject before the Committee of the Whole, or the Convention, but I do not find them reported in the debates.

"The language of the last sentence of Clause 88 seems to me to be so plain that there should be no doubt as to its meaning being what I have above stated, but I understand from you that it has been suggested that the sentence in question has reference only to cases involving constitutional questions. This, however, I am certain is a misconception.

"In order to explain the matter more fully to you I will say that in the Judiciary Committee, the various provisions which are now found in section 88, were introduced as independent provisions, from time to time, in that Committee, covering a period of several months. These independent provisions were discussed and passed upon as if they had been separate sections, but, when they had all been finally agreed upon, a sub-committee—composed as I recall of Messrs. Thom, Robertson and Meredith—was appointed to embody them in the form of one section.

"Under these circumstances the clause which now constitutes the last sentence of section 88, was, as I now recall, introduced in that Committee as a separate and independent measure and was considered and adopted entirely irrespective of the clause consisting of the sentence which immediately precedes it, and that the said last clause in that section had no reference whatever to the question as to whether a case involved a constitutional question or not.

"As the sentence was originally reported by the Judiciary Committee, and by the Committee of the Whole, and as it was afterwards adopted by the Convention, it began as follows:

"If, in any case, the requisite majority, &c."

"But the Revision Committee, of which I was also a member, and whose function was to alter the language whenever necessary, but not to change the substance, amended this sentence, by striking out the words 'if, in any case,' and inserting in lieu thereof, the single word 'whenever' so that the language as it now reads, is:

"Whenever the requisite majority, &c."

"This you can readily verify by looking at the Committee report in the volume containing the Journal and documents of the Constitutional Convention.

"If, therefore, in construing the sentence in question, you substitute the words 'if, in any case,' for the word 'whenever,' at the beginning of the sentence, I think it will seem somewhat plainer that that sentence is not intended to be restricted to those cases involving constitutional questions.

"I cannot but think that the *language* in section 88 shows not only that the last sentence was not intended to be limited to cases involving constitutional questions, but that it was not even intended to apply to such cases, because the sentence immediately preceding it, had already provided that the assent of at least three judges should be required to decide any constitutional question, and that, if, in any case, not as many as three judges could agree upon a constitutional question, the case should be heard again before a full court. From this I think it reasonably clear that, so far as cases involving constitutional questions are concerned, the last sentence of section 88, was entirely unnecessary because the sentence before it had already made a similar provision for such cases.

"From this, it will be seen that the last sentence was not necessary to be adopted, except with reference to cases which did not involve such questions—similar provisions, for cases which did involve such questions, having already been made by the next preceding sentence.

"My recollection is that the term 'requisite majority' was used in the last sentence of section 88, merely for brevity—it being recognized by the draughtsman that, in cases which did not involve constitutional questions, a majority of the court sitting might be two judges in some instances, and three judges in another, according to the number of judges sitting. Therefore, instead of saying:

"'Whenever two judges (where only three are sitting) or three judges (where four or five are sitting) are unable to agree, &c.,'

"it simply said:

"'Whenever the requisite majority (whatever that might be—whether two or three) were unable to agree, &c.'

"For these reasons, independent of my fairly distinct recollection of the facts, I have no doubt whatever, that the last sentence of section 88 was not intended to be limited to cases involving constitutional questions, if, indeed, it was even intended to apply to such cases at all."

RHULE V. SEABOARD AIR LINE RAILWAY COMPANY.*

Supreme Court of Appeals: At Richmond.

January 21, 1904.

Absent, *Cardwell*, J:

1. EJECTMENT—*Plaintiff's title—Trespasser.* A plaintiff in ejectment must, as a general rule, recover on the strength of his own title and not on the

* Reported by M. P. Burks, State Reporter.